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LAW AND ORGANIZATION

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Webster, as a prelude to his reply to Hayne, asked for the reading of the resolution before the Senate, in order that the mind of his hearers might be led back to the original and perhaps forgotten subject of the debate. Today we may well imitate his example, by recurring to fundamental principles. For five months we have stood in the presence of one of the most appalling wars in history, appalling not only because of its magnitude and destructiveness but also because of its frustration of hopes widely cherished that the progress of civilization had rendered an armed conflict between the leading powers of the world morally impossible. As a result we have since the outbreak of the great conflict been tossing about on the stormy sea of controversy, distrustful of our charts and guides, and assailed on every hand with cries of doubt and despair. We have been told that there is no such thing as international law; that, even if its existence be admitted, it is at most nothing but what superior force for the time being ordains; that international understandings, even when embodied in treaties, are practically worth-

less, being obligatory only so long as they may be conceived to subserve the interests or necessities of the moment; that the only security for the observance of international rules, general or conventional, is force, and that in force we must in the last analysis find our sole reliance.

Thoughts such as these, to which superheated minds have been known to give expression even in time of peace, are the natural product of times like those through which we are now passing. Students of law are familiar with the maxim, bequeathed to us by Cicero, that in the midst of arms the laws are silent—*inter arma silent leges*. This maxim primarily refers to municipal rather than to international law, but it may be applied to either. Its meaning and scope may easily be misconceived. It signifies in effect that, when a contest by force prevails, the ordinary rules and methods of administration become inadequate and give way to measures dictated by public necessity. The system by which the ordinary administration is superseded is called martial law. Under this system the ordinary guarantees of individual liberty are suspended; but, although this is the case, we should stray far from the truth if we were to accept in a literal or popular sense the statement that martial law is "the will of the general who commands the army." The true meaning of this phrase was expounded by the Duke of Wellington, the great commander who uttered it. The general in command, although he possessed supreme power, was, said the Duke of Wellington, "bound to lay down distinctly the rules and regulations and limits according to which his will was to be carried out." The Duke declared that he had in another country carried on martial law, and in so doing "had governed a large proportion of the population of the country by his own will." But then, he asked, what did he do? and his answer was, "he declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country strictly by the laws of the country; and he governed it with such moderation, he must say, that political servants and judges who at first had fled or had been expelled, afterwards consented to act under his direction. The judges sat in the courts

of law, conducting their judicial business and administering the law under his direction."[1]

It is thus evident that when, in discussing martial law, we refer to the "will" of the commanding general, we refer to regulated and not to arbitrary action, so that even in the theatre of war, where the military commander is supreme, the idea of law does not disappear.

The idea of law is in reality the very foundation of the entire theory of military occupation. The obedience which the inhabitants of the occupied territory owe to the military commander is merely an expression of this principle. While the inhabitants owe obedience, it is equally true that the military commander is on the other hand bound to render them protection, and is not permitted to treat them altogether as enemies so long as they observe the rules and regulations established for their government. Such is the principle laid down by writers on international law and by military commanders who have respected the established rules of international intercourse.

But it may be asked, what is international law? What is its essential nature; and, particularly, what is its position as compared with municipal law, and what is its sanction?

It may at the outset be admitted that a vast deal of time has been wasted in controversy over the question whether international law is law at all. These controversies, if minutely examined, will usually be found to have proceeded from one of two causes, namely, either (1) that the disputants have approached the subject from the point of view of preconceived definitions which were incapable of reconciliation, or (2) that, if they have agreed upon a definition, they have differed as to its application.

Probably no definition ever had a more pronounced effect on legal thinking than had the definition of law, given by Austin in his work on *Jurisprudence*, upon the legal mind of England and the United States. According to Austin, "a law, in the literal and proper sense of the word," is "a rule laid down for

[1] Speech of the Duke of Wellington, Debate on Affairs in Ceylon, House of Lords, April 1, 1851, Hansard, 3d series, CXV. 880.

the guidance of an intelligent being by an intelligent being having power over him." This definition, according to its author, embraced "laws set by God to men" and "law as set by men to men." Of the latter, some were "established by political superiors acting as such," and constituted "positive law"—the appropriate matter of jurisprudence. "Closely analogous to human laws," but "improperly termed laws," were, he declared, "rules set and enforced merely by the opinion of an intermediate body of men," such as "the law of honor," or the "laws of fashion." Rules of this species constituted, he said, much of what was commonly termed "International Law;" and he placed them all in the category, not of law, but of "positive morality." Among the essentials of a law properly so called, he specified a "command" and a "sanction," the latter being the evil which would probably be incurred in case a command should be disobeyed.

Without commenting upon a terminology that smacks of the medieval, *jure divino* conception of law as the product of superior power rather than of delegated authority, a moment's reflection suffices to show that Austin's so-called definition is at most merely a description of municipal law, and even for that purpose is not sufficiently comprehensive, since it would, for instance, exclude a large part of constitutional law, much of which, like a considerable part of international law, is not enforced by courts by means of specific penalties. Nor would it be difficult to show that it is in its conceptions historically faulty. Sir Henry Maine, in his volume on *International Law*, dismisses Austin's criticisms on that system as "very interesting and quite innocuous," and rather scouts the supposition "that Austin had intended to diminish, and had succeeded in diminishing, the dignity or imperative force of international law." I am altogether unable to accept this cheerful view. I think it may easily be shown that at one time Austin's relegation of international law to the sphere of morality had a pronounced effect even upon legal decisions in England, as in the case of the *Franconia*.[2]

[2] Queen vs. Keyn (1876), 13 Cox C. C. 403; 2 Ex. Div. 63.

Acting upon the assumption that Austin's description of municipal law was to be received as the ultimate test by which the admission of rules of conduct to the category of "law" was to be determined, writers have now and then made vain attempts to bring international law within his definition, and in order to prove that such inclusion was possible, have invoked the principle that international law is "a part of the law of the land." This principle has, as is well known, been enunciated and applied in a number of cases by the English courts, though with less precision and confidence since Austin's day than before. In the decisions of the American courts it may, I think, be said fortunately to have escaped an eclipse. But, even if we were to assume that it had nowhere been questioned, it must be admitted that the principle that the "law of nations," or international law, is a part of the law of the land, does not go to the root of the difficulty. Even though a court may accept the doctrine in good faith, its interpretation of international law may, by reason of national bias or local influence, prove to be contrary to the general sense, or, still worse, the court may be compelled by legislative direction to apply a rule flagrantly inconsistent with what is generally understood to be the accepted principle. In such a contingency, the question necessarily arises as to what is to be done to secure the application and enforcement of that principle.

It is just here that we disclose the practical difference between international law and municipal law. Speaking comprehensively, we may say that a law is an obligatory rule of action. In the course of history, men, acting in certain ways or through certain forms, have worked out and have come to accept certain rules for the government of their conduct. In a general sense all such rules may be called laws; but with a view to preserve that freedom of action which is essential to self-development, it has been deemed expedient to give to only a part of such rules the force of positive obligation. The observance of the rest of them is left to the choice of the individual, who may be deterred from disregarding them by a good disposition, or by an apprehension of self-injury or of moral censure.

To the rules lying within the sphere in which observance is

deemed to be essential to the general welfare and is therefore admitted to be obligatory, we give the name of law. These rules we undertake by one means or another to enforce, and measures are adopted for the purpose of making their observance compulsory.

For this reason, the world has come to regard the rules governing the intercourse of nations as constituting a system of law, for the maintenance of which even the use of coercion is justified, and this system is, as students know, much older than is popularly supposed. Phillipson, in his recent work entitled *The International Law and Custom of Ancient Greece and Rome*, has given a comprehensive and systematic survey of the international practices of those great commonwealths, with a special view to demonstrate "their respective acceptance of and insistence on juridical principles, and their application of a regularized procedure and legal methods to international relationships." The popular supposition that international law, as we now know it, originated with Grotius, whose great work *De Jure Belli ac Pacis* was published in 1625, is due to the circumstances that his treatise was exceptionally clear, comprehensive and systematic, and for that reason formed a landmark in the development of the science; but if one will take the trouble, as few now do, to examine the pages of Grotius, it will be found not only that he drew his inspiration and his opinions largely from earlier times and writers, but also that some of his fundamental doctrines are now quite obsolete. Sir John Macdonell, indeed, in his introductory note to Phillipson's work, declares that the "system of international law in the ancient world" is "in some respects much more akin to that of today than international law as it was in the time of Grotius. In the number and variety of autonomous states," says Sir John; "in the many different forms of their constitutions; in the existence of autonomous democratic states; in the conception of the state itself, wholly different from the feudal or patrimonial conception; in the number and variety of dependent communities, in the existence of federations; in the unstable balance of power; in the relations of the mother countries to autonomous colonies; in the multitude of treaties

dealing with many subjects besides peace and war; in the developed use of arbitration, as a mode of settling differences; in the practice as to passports,—in these and many other matters there is more likeness between the international law in ancient Greece and that of today than there is between the latter and international law as described in *De Jure Belli ac Pacis.*"

In the development of international law, we find that the same forces have operated and to a certain extent the same methods have prevailed as in municipal law. Till a comparatively recent day international law developed chiefly through the gradual evolution of opinion and practice; and, just as in the case of municipal law, the prevailing opinion and practice would from time to time be embodied in some notable declaration or decision, which would be received as the authoritative formulation of accepted usage. The gradual evolution of international law was exemplified with the utmost precision and force by the Supreme Court of the United States in the case of the Spanish fishing smacks, in 1900.[3] The particular point decided was that coast fishing vessels, unarmed and honestly pursuing the peaceful calling of catching and bringing in fresh fish, were exempt from capture in time of war. In opposition to this view there was cited by counsel an opinion of Lord Stowell to the effect that the exemption was "a rule of comity only, and not of legal decision." The Supreme Court, however, declared that the period of a hundred years that had elapsed since Lord Stowell's opinion was uttered was "amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law."

But, just as, in the case of municipal law, the statutory element has increased at the expense of the customary, so, in international law, there has been an increasing tendency to introduce modifications and improvements by acts in their nature legislative. A great advance towards assuring the free nagivation of international streams of water was made by the Vienna Congress Treaty of

[3] *The Paquete Habana* (1900), 175 U. S. 677.

June 9, 1815, by which the contracting parties agreed that rivers which separated or traversed two or more states should, along their whole navigable course, be, in respect of commerce, entirely free to everyone, subject only to regulations of police. This principle, although applied primarily to the Rhine, was expressly extended to the Neckar, the Mayne, the Moselle, the Meuse, and the Scheldt. With a limitation of the right of free navigation in some instances to the citizens or subjects of the riparian powers, similar stipulations may be found in treaties relating to the rivers and canals of the ancient kingdom of Poland; to the Elbe, Po, Pruth, Douro, Danube, and other rivers in Europe; and to the rivers Amazon, Paraguay, Uruguay, St. Lawrence, Yukon, Porcupine, and Stikine, in America.

By the same Congress, an important contribution to international law was made in the form of rules to regulate the rank and precedence of diplomatic agents. These rules, slightly modified by the Congress of Aix-la-Chapelle of 1818, were accepted by all the powers which then composed the international circle, and resulted in the regulation of a subject which had constantly given rise to disputes.

Yet more remarkable as an act of legislative aspect was the Declaration on Maritime Law, made by the Congress of Paris of 1856. This Declaration embraced four rules:

"1. Privateering is and remains abolished.

"2. A neutral flag covers an enemy's goods, with the exception of contrabrand of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

The fourth rule may be considered as merely declaratory of international law, and so also may the third rule. But by the first two rules it was proposed to give the character and force of law to principles which had previously been obligatory only when they were made so by treaty; and to this end the signatories announced their purpose to invite the adhesion of other powers

with a view "to establish a uniform rule." The powers invited to adhere embraced practically all those within the sphere of international law; and, with the exception of the United States, Spain and Mexico, they accepted the Declaration in its entirety. Spain gave her adhesion several years ago, but the United States has not as yet done so. Their original objection to adhering was based upon the naked inhibition of privateering, an objection which would have lost much of its force if it had been foreseen that merchant vessels might be incorporated into the navy without violating either the letter or the spirit of the declaration. All the powers, however, approved the second rule, that free ships make free goods, and it has since been regarded as a principle of international law. It was expressly so proclaimed both by the United States and by Spain at the outbreak of the war between them in 1898.

Since 1860 numerous attempts have been made, by means of international conferences, to legislate on the modes of conducting warfare. The Geneva Convention of August 22, 1864, for the amelioration of the condition of the wounded in armies in the field, commonly called the Red Cross convention, is known to all. The observance of the provisions of this convention is considered a test of civilization. Agreements such as the Declaration of St. Petersburg of 1868, which was framed by an international military commission, have been made as to the nature of the weapons that may be used in war, and as to the treatment of prisoners of war. Nor should we omit to mention the project of Declaration concerning the Laws of War on Land, formulated by the Brussels Conference of 1874. Although the powers represented in the conference afterwards failed to make the declaration binding, it forms the basis of the "Manual" of the Institute of International Law of 1880, of the plan adopted by the Spanish-Portuguese-Latin-American Military Congress at Madrid in 1892, and also of the Hague Convention relating to the Laws and Usages of War on Land. Unfortunately, it cannot be said that the Hague conventions relating to the conduct of war on land and sea have, as to the conflict now in progress in Europe, the force of international compacts. Each of

the conventions contains a clause to the effect that its provisions "do not apply except between contracting parties, and then only if all the belligerents are parties to the conventions." Servia, one of the belligerents in the pending war, has not ratified any of the conventions; and yet other belligerents have not ratified some of them. The rules they lay down are therefore binding upon the belligerents only so far as they are declaratory of existing international law.

But, let us assume that international rules of conduct, founded either on usage or on treaties, are disregarded. What then is to be done? It is just here, as I have intimated, that we find the practical difference between international law and municipal law, and this difference relates to organization.

Before proceeding to discuss the subject of organization, I desire to comment upon certain impressions, which I conceive to be erroneous, in regard to international law and its observance. It is often hastily assumed (1) that the rules of international law are, as contrasted with the rules of municipal law, exceedingly indeterminate, and (2) that, even when they are ascertainable, they are little heeded. Both these assumptions are for the most part unfounded. The fact cannot be denied that there exists in the sphere of international law a considerable amount of uncertainty as to what the law actually is; but, that such uncertainty is not unknown in the domain of municipal law is amply demonstrated by the ever accelerating accumulation of judicial decisions and the diverse, discordant, conflicting views which they so often exhibit. Even our legislative enactments do not uniformly afford relief. It took, for instance, nearly twenty years, with the aid of our judicial authorities, to ascertain the meaning of the so-called Sherman Law, and when the Supreme Court at length applied to it "the rule of reason," there were those who felt so much or so little regard for the wisdom of Congress as to assert that the effect of the statute had been misinterpreted. And even yet its bearing upon some of our most important companies remains to be determined.

At the present moment there are important forms of contract, of almost world-wide use, the sense of whose eventual interpretation

by the courts on capital points is a matter of pure conjecture, not because of any difficulty as to facts or even as to the application of principles to facts, but because of absolute uncertainty as to the rules of municipal law. How can one predict what the decision of a common law court will be on a point of law not before precisely determined, when the court may "on full consideration" overturn a previously established rule, as happened, for instance, when it was held that insurance on enemy property was illegal and void?

In respect of actual observance, I venture to say that international law is on the whole as well observed as municipal law. Perhaps one would not go too far in saying that it is better observed, at any rate in time of peace. In time of war, when a contest by force exists, it is needless to repeat that the application of law, whether municipal or international, becomes more or less uncertain, and that, as turmoil and excitement grow, the uncertainty increases. In time of peace, however, the regard which nations are accustomed to feel for their reputation and dignity strongly influences them, perhaps quite as much as does the dread of retaliation, to respect the rules by which their intercourse is confessedly regulated. If one would only reflect upon the smallness of the number of international claims that arise in times of internal and external peace, he would not be disposed to question the correctness of this statement. It is in seasons of disturbance, domestic or international, that complaints and claims spring up.

Assuming, however, that international law has been disregarded, where is a remedy to be sought? If muncipal law is violated, we apply to the administrative officials, or to the courts, as a means of securing redress. We appeal, in other words, to constituted authorities, who are empowered to do justice; and, if law is lacking, we may go to the legislature to supply the defect, at least for the future. In other words, we have within the state an organization for the enforcement of justice according to law.

In the international sphere, under similar conditions, we proceed in the first instance amicably, through diplomatic officials, who are the constituted authorities for this purpose. We negotiate

and in case an agreement should not be reached, we may accept the good offices or the mediation of a third power; or we may submit the question to judicial settlement, by means of arbitration. These are all amicable modes of redress, which international organization in its present state provides. If they do not succeed, it is laid down that we may try inamicable methods, ranging all the way from retorsion or retaliation, embargo, commercial non-intercourse, severance of diplomatic relations, and display of force, to reprisals, which are acts of war, and to war itself, which is in its physical aspect merely general reprisals. Nevertheless, if actual force be employed, there is always the danger of forcible resistance, ending in war; and in that event we may have the incongruous result that the aggressor, without submitting to the examination of any tribunal the justice of his cause, may, in the exercise of the "rights of war," conquer or destroy the injured power which he has by his own wrong driven to become his adversary.

This principle, which I conceive to be the capital defect of international law at the present day, is perhaps to be explained as a survival of the superstitions that preserved in municipal law for so many centuries the process of trial by battle. However this may be, it is flagrantly at variance with all conceptions of human right, and can be effectually got rid of only through further organization. It is in this respect, as I have intimated, that international law differs from municipal law—not in its essence or its obligation, but in the method of its declaration and administration. Within the state we have an organization for the making, declaration and enforcement of law, whereas, as between nations, we are obliged to a great extent to rely upon their voluntary concurrence or coöperation. In other words, we lack in the international sphere that organization which gives to the administration of law within the state a certain security. This defect it is the business of nations to supply by forming among themselves an appropriate organization.

The essential features of such an organization would be somewhat as follows:

1. It would set law above violence: (1) By providing suitable

and efficacious means and agencies for the enforcement of law; and (2) by making the use of force illegal, except (a) in support of a duly ascertained legal right, or (b) in self-defense.

The first effect of such an organization would be to give an additional sanction to the principle of the equality of independent states before the law. "No principle of general law," said Chief Justice Marshall, "is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights."[4] "Power or weakness," said the great Swiss publicist, Vattel, "does not in this respect produce any difference." And, incidentally, in proportion as this principle was maintained, the monstrous supposition that power is the measure of right would tend to disappear, and the claims of predatory conquest would become less and less capable of realization.

2. It would provide a more efficient means than now exists for the making and declaration of law.

We have adverted to the development of international law through the gradual evolution of opinion and practice, and also to attempts made during the past hundred years to establish rules by acts in their nature legislative. The chief obstacle to the efficacy of the second method is the requirement of unanimity. In the declaration of law on the strength of usage, it has never been supposed to be necessary to show that each particular nation had affirmatively adopted it. It appearing that the usage is general, all nations that profess to be law-governed are assumed at least tacitly to have accepted it. But, when we come to legislation, each nation must, it is held, give its assent, in order that it may be bound. Undoubtedly it would be going too far in the present state of things to propose a mere majority rule. But it is altogether desirable that a rule should be adopted whereby it may no longer be possible for a single state to stand in the way of international legislation. The adoption of such a rule could not be regarded as impairing in a proper sense the principle of the equality of nations. Nations have responsibilities as well as rights.

[4] The Antelope, 10 Wheaton, 66, 122.

3. It would provide more fully than has heretofore been done for the investigation and determination of disputes by means of tribunals, possessing advisory or judicial powers, as the case might be.

The neglect of such processes has been the great defect of the European Concert. I am not among the number of those who hold towards that organization an attitude wholly accusatory. Its efforts have no doubt in the main been sincerely directed to the preservation of peace. But, its proceedings would often have been less open to suspicion and would have tended to produce more lasting results, if considerations of fact and of law had played a larger part in its deliberations.

Such I conceive to be the essentials of an organization which would place international law on substantially the same footing as municipal law, as regards its making, declaration and enforcement. But, the fact is not to be lost sight of that, in the present state of human development, there is no absolute security for the uninterrupted maintenance of law, national or international, or for the continuous preservation of peace. We are often told that in the last analysis the ultimate sanction of law is "public opinion," by which is meant, we may assume, not so much the intelligent conclusions reached by processes of reasoning, as the general state of mind which, frequently dominated by sentiment, determines the attitude of a people or of the world. Logically speaking, whether the popular attitude be dictated by reason or by sentiment, forcible opposition to law has no excuse where universal suffrage practically prevails, as it does in the United States. In so saying, I of course do not intend to enter upon the discussion of the vexed question of woman suffrage, which I may follow high authority in leaving to the determination of the several States. Eliminating this, however, as a cause of war, I repeat that, if the predominant opinion should always rightfully prevail, then, where ballots have been substituted for bayonets forcible opposition to law and its administration would seem to be without justification. Nevertheless, we know that, in respect of civil strife, the United States has not escaped the misfortunes to which other nations, in which the suffrage was less extended,

have now and then been subject. This fact may be ascribed (1) to the circumstance that there is a large part of human activities, especially of a competitive kind, not yet brought within the sphere of legal regulation and (2) to the propensity of men acting in the mass to attain their ends by violence. This tendency no doubt should diminish in proportion as the suffrage is made free. In the United States, with its immense extent of territory and its great population, we have before us the spectacle of long-continued internal peace with a standing military force that would scarcely form the nucleus of an army sufficient for any considerable emergency. Nevertheless, it would be rash to assume that we are permanently immune from the danger of domestic strife. Without going into a discussion of the causes, we have lately witnessed in one of our States a condition of things resembling war, while at the same time an armed conflict was threatened in a part of the British dominions, in which civil war had come to be regarded as almost unthinkable.

Occasional conditions such as these should by no means lessen our estimate of the importance of organization for the maintenance of law, either international or internal. They should, on the contrary, serve to emphasize not only the necessity of organization, but also the importance of extending its scope and increasing its efficiency. Meanwhile, they also indicate the futility of relying upon any single device, such as a court, as an all-sufficient means of preserving peace and order. Experience has demonstrated that, even within comparatively small areas, local conditions must be consulted, in order that the administration of law may not produce discomfort and discontent; and, as long as discontent and ambition continue to play in the affairs of the world a conspicuous part, so long will it be necessary to be prepared either to satisfy or to resist them.